Message Text

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C O N F I D E N T I A L STATE 169602

E.O. 11652: GDS
TAGS: ENRG, IS, JO
SUBJECT: ISRAELI OIL ACTIVITIES ON WEST BANK

REFS: A. AMMAN 03671; B. TEL AVIV 3037

1. REF A REQUESTED REVIEW OF LEGAL IMPLICATIONS AND EFFECTS OF ISRAELI MILITARY OCCUPATION OF WEST BANK REGION, WITH PARTICULAR REFERENCE TO OIL PROSPECTING ACTIVITIES OF U.S. CONFIDENTIAL

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FIRM REPORTED REF B. REF A ALSO REQUESTED REVIEW OF RE-LATED POLITICAL PROBLEMS AND STATEMENT FOR BACKGROUND AND POSSIBLE USE.

2. USG HAS ALWAYS CONSIDERED STATUS OF ISRAEL IN WEST BANK TO BE THAT OF MILITARY OCCUPANT. THUS, FOR EXAMPLE, WE HAVE CONSISTENTLY TAKEN THE POSITION THAT FOURTH GENEVA CONVENTION (RELATIVE TO PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR) APPLIES TO ISRAELI ADMINISTRATION OF THAT REGION AS WELL AS OTHER OCCUPIED TERRITORIES.

3. FOURTH GENEVA CONVENTION DOES NOT, HOWEVER, DEAL WITH QUESTIONS SUCH AS THAT OF EXPLOITATION OF NATURAL RESOURCES, EXCEPT INSOFAR AS SUCH ACTIVITIES MAY BE CONSIDERED TO CONTRAVENE ARTICLE 53 OF THE CONVENTION. THAT ARTICLE PROHIBITS "ANY DESTRUCTION BY THE OCCUPYING POWER OF REAL OR PERSONAL PROPERTY BELONGING...TO PRIVATE PERSONS, OR TO THE (OCCUPIED) STATE, OR TO OTHER PUBLIC AUTHORITIES...

EXCEPT WHERE SUCH DESTRUCTION IS RENDERED ABSOLUTELY NECESSARY BY MILITARY OPERATIONS." UNGA HAS TAKEN POSITION THAT ISRAELI "EXPLOITATION OF THE NATURAL WEALTH, RESOURCES AND POPULATION OF THE OCCUPIED TERRITORIES" CONSTITUTES VIOLATION OF THE FOURTH CONVENTION (RES. 3092B, DEC. 7, 1973). THE UNITED STATES OPPOSED THAT RESOLUTION, WHICH WAS, HOWEVER, ADOPTED BY A VOTE OF 90-7-27. ALTHOUGH EXPLOITATION OF A WASTING RESOURCE MAY PRESENT CLOSE QUESTION IN EYES OF SOME, WE WOULD NOT REGARD SUCH ACTIVITY, AT LEAST IF CARRIED OUT IN RESPONSIBLE MANNER WHICH PRESERVED VALUE AND EXPLOITABILITY OF REMAINING RESERVES, AS "DESTRUCTION" WITHIN MEANING OF FOREGOING PROVISION.

4. FUNDAMENTAL RULES GOVERNING EXPLOITATION OF NATURAL RESOURCES DERIVE FROM 1907 HAGUE CONVENTION IV, AND REGULATIONS ANNEXED THERETO, AND FROM PRINCIPLES OF CUSTOMARY INTERNATIONAL LAW GOVERNING USE OF PROPERTY BY OCCUPYING POWER. UNDER THOSE RULES, RIGHT OF MILITARY OCCUPANT TO SEIZE OR MAKE USE OF PROPERTY DEPENDS UPON, AMONG OTHER THINGS, WHETHER PROPERTY IN QUESTION IS (OR WAS AT TIME OF OCCUPATION) PUBLICLY OR PRIVATELY-OWNED.
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BASIC PRINCIPLES ARE AS FOLLOWS:

A.1. AS TO PUBLIC REAL (IMMOVABLE) PROPERTY, OCCUPYING POWER MAY NOT SELL OR OTHERWISE ALIENATE PUBLIC LAND OR BUILDINGS BUT MAY APPROPRIATE THEIR PRODUCTS. ARTICLE 55 OF THE HAGUE REGULATIONS PROVIDES THAT THE OCCUPIER "SHALL BE REGARDED ONLY AS ADMINISTRATOR AND USUFRUCTUARY OF PUBLIC BUILDINGS, REAL ESTATE, FORESTS, AND AGRICULTURAL ESTATES," AND THAT "IT MUST SAFEGUARD THE CAPITAL OF THESE PROPERTIES, AND ADMINISTER THEM IN ACCORDANCE WITH THE RULES OF USUFRUCT." UNDER THIS RULE, ACCORDING TO THE U.S. ARMY FIELD MANUAL, "THE OCCUPANT DOES NOT HAVE THE RIGHT OF SALE OR UNQUALIFIED USE OF SUCH PROPERTY.

AS ADMINISTRATOR AND USUFRUCTUARY HE SHOULD NOT EXERCISE HIS RIGHTS IN SUCH A WASTEFUL AND NEGLIGENT MANNER AS SERIOUSLY TO IMPAIR ITS VALUE. HE MAY, HOWEVER, LEASE OR UTILIZE PUBLIC LANDS OR BUILDINGS, SELL THE CROPS, CUT AND SELL TIMBER, AND WORK THE MINES." WHETHER LIFTING OF OIL, ESPECIALLY FROM PREVIOUSLY UNDISCOVERED DEPOSITS, IS CONSISTENT WITH THIS RULE ISNOT EASY TO DETERMINE, BUT IT WOULD NOT APPEAR TO BE FULLY CONSISTENT WITH THE CONCEPT OF USUFRUCT, WHICH IS DEFINED AS "THE RIGHT OF ENJOYING A THING THE PROPERTY OF WHICH IS VESTED IN ANOTHER, AND TO DRAW FROM THE SAME ALL THE PROFIT, UTILITY AND ADVANTAGE WHICH IT MAY PRODUCE, PROVIDED THAT IT BE WITHOUT ALTERING THE SUBSTANCE OF THE THING."

A.2. WITH RESPECT TO PUBLIC MOVABLE PROPERTY, ARTICLE 53 OF THE HAGUE REGULATIONS PROVIDES GENERALLY THAT THE OCCUPYING STATE MAY TAKE POSSESSION OF "ALL MOVABLE PROPERTY BELONGING TO THE (OCCUPIED) STATE WHICH MAY BE USED FOR MILITARY OPERATIONS." SUCH SEIZURE NEED NOT BE COMPENSATED.

B.1. AS TO PRIVATE PROPERTY, THE RULES ARE SOMEWHAT MORE STRICT. ARTICLE 46 OF THE HAGUE REGULATIONS PROVIDES THAT "PRIVATE PROPERTY CANNOT BE CONFISCATED." WHILE THIS DOES NOT EXCLUDE TEMPORARY USE OF PRIVATE LAND AND BUILD-INGS FOR PURPOSES REQUIRED BY THE NECESSITIES OF WAR, PARTICULARLY THE USE OF BUILDINGS FOR MILITARY PURPOSES, WITHOUT COMPENSATION, IT DOES NOT APPEAR THAT THE OCCUPY-

ING POWER ENJOYS A RIGHT OF USUFRUCT AS IN THE CASE OF PUBLIC PROPERTY.

B.2. CONCERNING PRIVATE MOVABLE PROPERTY, ARTICLE 53 OF THE HAGUE REGULATIONS PERMITS THE SEIZURE OF ALL PRIVATELY-OWNED MEANS OF TRANSPORT AND COMMUNICATION, AND "MUNITIONS DE GUERRE," BUT REQUIRES THEIR RESTORATION AND PAYMENT OF COMPENSATION WHEN PEACE IS MADE. AS TO OTHER GOODS (AND SERVICES), ARTICLE 52 PROHIBITS REQUISI-TIONING "EXCEPT FOR THE NEEDS OF THE ARMY OF OCCUPATION," AND THEN REQUIRES PAYMENT IN CASH AS SOON AS POSSIBLE.

C. UNDER ARTICLE 56 OF THE HAGUE REGULATIONS, THE PROPER-TY OF MUNICIPALITIES IS TREATED AS PRIVATE PROPERTY, I.E. IN ACCORDANCE WITH SUB-PARAGRAPHS B.1. AND B.2 ABOVE.

5. APPLICATION OF FOREGOING PRINCIPLES TO ACTIVITIES REPORTED REF B IS DIFFICULT. AMONG THE PROBLEMS ARE THE FOLLOWING:

A. IT IS NOT CLEAR WHETHER OIL IN THE GROUND IS GOVERNED

BY THE RULES RELATING TO REAL (IMMOVABLE) OR MOVABLE PROPERTY. UNDER OUR LEGAL SYSTEM, PROPERTY RIGHT IN SUBSURFACE MINERALS APPERTAINS TO OWNERSHIP OF SURFACE RIGHTS (AND IS THUS REAL PROPERTY) UNTIL THE MINERAL IS REMOVED OR MINERAL RIGHTS ARE CONVEYED SEPARATELY. OTHER LEGAL SYSTEMS, HOWEVER, APPLY DIFFERENT RULES, AND IT IS UNCLEAR WHAT INTERNATIONAL STANDARD SHOULD BE. IN AT LEAST ONE CASE, THOUGH, LEGALITY OF OCCUPYING POWER'S TAKING OF CRUDE OIL IN GROUND HAS BEEN JUDGED IN ACCORD-ANCE WITH RULES GOVERNING MOVABLE PROPERTY.

B. SEPARATE BUT RELATED QUESTION IS WHETHER OWNERSHIP

OF OIL RIGHTS WAS IN PUBLIC OR PRIVATE HANDS AT TIME OF ISRAELI OCCUPATION IN 1967. THIS WOULD PROBABLY (THOUGH NOT CLEARLY) BE MATTER OF JORDANIAN LAW AND COULD OBVIOUSLY VARY DEPENDING ON THE SPECIFIC AREA IN QUESTION.

C. THIRD ISSUE IS WHETHER OIL IN THE GROUND, IF REGARDED CONFIDENTIAL

AS MOVABLE PROPERTY, CAN BE APPROPRIATED ON THEORY THAT (IF PUBLICLY OWNED) IT "CAN BE USED FOR MILITARY OPERA-TIONS," OR (IF PRIVATELY OWNED) IT FALLS INTO THE CATEGORY OF "MUNITIONS DE GUERRE." ALTHOUGH THE FIRST PROPOSITION SEEMS VALID ON ITS FACE, IN THE OVERALL CONTEXT OF THE REGULATIONS AS A WHOLE IT DOES NOT APPEAR THAT PUBLIC MOVABLE PROPERTY, EVEN THOUGH SUSCEPTIBLE OF MILITARY USE, CAN BE SEIZED FOR NON-MILITARY USE, AT LEAST OUTSIDE THE OCCUPIED TERRITORY. AS TO PRIVATELY-OWNED OIL, THERE IS AUTHORITY BOTH FOR AND AGAINST THE CLASSIFICATION OF CRUDE OIL (EVEN IN THE GROUND) AS "MUNITIONS DE GUERRE," BUT, EVEN IF IT WERE SO CONSIDERED, COMPENSATION WOULD BE REQUIRED AT THE TIME OF A PEACE SETTLEMENT FOR THE SEIZURE OF ANY PRIVATELY-OWNED OIL.

6. REMEDIES FOR VIOLATION OF FOREGOING OBLIGATIONS VARY. COMPENSATION IS, OF COURSE, THE MOST COMMON, BUT IT ALSO APPEARS THAT PROPERTY UNLAWFULLY TAKEN BY THE OCCUPYING POWER AND SOLD TO A THIRD PARTY MAY AFTERWARDS BE CLAIMED FROM THE PURCHASER WITHOUT PAYMENT OF COMPENSATION (TO AVAIL HIMSELF OF THIS RIGHT THE CLAIMANT WOULD, OBVIOUSLY, HAVE TO FIND THE PROPERTY IN SOME PLACE IN WHICH IT COULD ENFORCE SUCH A CLAIM). IN CONTEXT OF A PEACE SETTLEMENT, CLAIMS MIGHT, AS A PRACTICAL MATTER, BE OFFSET AGAINST ASSERTED CLAIMS OF OCCUPYING GOVERNMENT FOR SO-CALLED "OCCUPATION COSTS". IT SHOULD BE NOTED THAT UNGA, IN RESOLUTION OPPOSED BY U.S., HAS DECLARED THAT THE ARAB STATES AND PEOPLES UNDER OCCUPATION "ARE ENTITLED TO RESTITUTION OF AND FULL COMPENSATION FOR THE EXPLOITATION AND LOOTING OF, AND DAMAGES TO, THE NATURAL RESOURCES...". (RES 3175, DEC. 17, 1973).

7. AS YOU WILL PERCEIVE, FOREGOING STATE OF LAW ON THE SUBJECT PROVIDES LESS THAN TOTALLY CLEAR BASIS FOR U.S. TO TAKE FIRM POSITION. MOREOVER, IN ADDITION TO UNCERTAINTIES IN THE LAW OF MILITARY OCCUPATION AS IT RELATES TO THE QUESTION OF OIL EXPLORATION, THERE ARE SOME, INCLUDING OF COURSE THE ISRAELIS, WHO DO NOT CONSIDER THAT BODY OF LAW NECESSARILY GERMANE TO THE WEST BANK OR OTHER TERRITORIES OCCUPIED IN 1967. FINALLY, WE WOULD, AS A PRACTICAL MATTER, WANT TO URGE BOTH SIDES TO REFRAIN
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FROM PUSHING EXTREME LEGAL POSITIONS ON QUESTIONS OF

COMPENSATION, ETC., IN COURSE OF SETTLEMENT NEGOTIATIONS. WE THEREFORE DO NOT CONSIDER IT IN OUR INTEREST TO STAKE OUT A CLEAR U.S. POSITION ON THESE ISSUES.

8. SHOULD ADDRESSEE POSTS BE QUERIED BY COMPANIES CONTEMPLATING PARTICIPATION IN OPERATIONS OF THIS SORT, YOU SHOULD INDICATE THAT USG HAS SUBSTANTIAL DOUBTS AS TO LEGAL IMPLICATIONS OF OIL EXPLOITATION IN OCCUPIED TERRITORIES. WE HAVE IN ANY EVENT REFRAINED FROM TAKING POSITION AS TO LEGAL STATUS AND CONSEQUENCES OF SUCH ACTIVITIES AND BELIEVE THAT TO DO SO NOW OR IN FUTURE MIGHT BE COUNTERPRODUCTIVE IN TERMS OF OUR BROADER INTEREST IN ACHIEVING AN OVERALL SETTLEMENT. SHOULD CLAIMS FOR COMPENSATION OR DAMAGES, POSSIBLY AFFECTING U.S. FIRMS, BE PRESSED IN COURSE OF NEGOTIATIONS, OR SHOULD PROPERTY IN WHICH U.S. FIRMS HAVE AN INTEREST BE SEIZED PURSUANT TO SUCH CLAIMS, USG WOULD HAVE TO BE GUIDED BY LARGER INTERESTS, WHETHER OR NOT THEY COINCIDED WITH THOSE OF COMPANIES.
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